MONTANA LEGISLATIVE HISTORY

Chapter 13 1995

Bill H _____ S 40 Original bill & history ✓ C

H. Committee on Local Government			S. Committee on Local Government		
Hearing Date(s)	Feb 10	✓ C	Hearing Date(s)	Jan 18	✓ C
		C		Jan 21	✓ C
		C		Jan 28	✓ C
		C			C
Date Out	Feb 10	✓ C		Jan 28	✓ C

Did this bill originate in an interim committee? ____ Yes ____ No

Committee _____ Report _____

LC 0381

Senate BILL NO. 40

INTRODUCED BY Senator Duke Romney Thomas
Flynn

A BILL FOR AN ACT ENTITLED: "AN ACT TO AMEND SECTION 11-2707, R.C.M. 1947, TO PROVIDE THAT AN ORDINANCE CREATING A BOARD OF ADJUSTMENT MAY RESERVE CERTAIN DECISIONS TO THE CITY OR TOWN."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 11-2707, R.C.M. 1947, is amended to read as follows:

"11-2707. Board of adjustment. Such city or town council or other legislative body may provide for the appointment of a board of adjustment, and in the regulations and restrictions adopted pursuant to the authority of this act may provide that the said board of adjustment may, in appropriate cases, and subject to appropriate conditions and safeguards, make special exceptions to the terms of the ordinance in harmony with its general purposes and intent and in accordance with the general or specific rules therein contained.

An ordinance adopted pursuant to this section providing for a board of adjustment may restrict the authority of the board and provide that the city or town council, or other legislative body, reserves to itself the power to make certain exceptions to regulations, ordinances, or land use plans adopted pursuant to this chapter.

(1) The board of adjustment shall consist of five (5) members, each to be appointed for a term of three (3) years and removable for cause by the appointing authority upon written charges and after public hearing. Vacancies shall be filled for the unexpired term of any member whose term becomes vacant.

(2) The board shall adopt rules in accordance with the provisions of any ordinance adopted pursuant to this act. Meetings of the board shall be held at the call of the chairman and at such other times as the board may determine. Such chairman, or in his absence the acting chairman, may administer oaths and compel the attendance of witnesses. All meetings of the board shall be open to the public. The board shall keep minutes of its proceedings, showing the vote of each member upon each question, or if absent or failing to vote, indicating such fact, and shall keep records of its examinations and other official actions, all of which shall be immediately filed in the office of the board and shall be a public record.

(3) Appeals to the board of adjustment may be taken by any person aggrieved or by any officer, department, board, or bureau of the municipality affected by any decision of the adminstrative officer. Such appeal shall be taken within

INTRODUCED BILL

SB 40

a reasonable time, as provided by the rules of the board, by filing with the officer from whom the appeal is taken and with the board of adjustment a notice of appeal specifying the grounds thereof. The officer from whom the appeal is taken shall forthwith transmit to the board all papers constituting the record upon which the action appealed was taken.

(4) An appeal stays all proceedings in furtherance of the action appealed from, unless the officer from whom the appeal is taken certifies to the board of adjustment after the notice of appeal shall have been filed with him that by reason of facts stated in the certificate a stay would, in his opinion, cause imminent peril to life or property. In such case proceedings shall not be stayed otherwise than by a restraining order which may be granted by the board of adjustment or by a court of record on application on notice to the officer from whom the appeal is taken and on due cause shown.

The board of adjustment shall fix a reasonable time for the hearing of the appeal, give public notice thereof, as well as due notice to the parties in interest, and decide the same within a reasonable time. Upon the hearing any party may appear in person or by attorney.

(5) The board of adjustment shall have the following powers:

To hear and decide appeals where it is alleged there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement of this act or of any ordinance adopted pursuant thereto.

To hear and decide special exceptions to the terms of the ordinance upon which such board is required to pass under such ordinance.

To authorize upon appeal in specific cases such variance from the terms of the ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done.

(6) In exercising the above-mentioned powers such board may, in conformity with the provisions of this act, reverse or affirm, wholly or partly, or modify the order, requirement, decision, or determination appealed from and may make such order, requirement, decision, or determination as ought to be made, and to that end shall have all the powers of the officer from whom the appeal is taken.

(7) The concurring vote of four (4) members of the board shall be necessary to reverse any order, requirement, decision, or determination of any such administrative official, or to decide in favor of the applicant on any

matter upon which it is required to pass under any such ordinance, or to effect any variation in such ordinance.

(8) Any person or persons, jointly or severally, aggrieved by any decision of the board of adjustment, or any taxpayer, or any officer, department, board, or bureau of the municipality, may present to a court of record a petition, duly verified, setting forth that such decision is illegal, in whole or in part, specifying the grounds of the illegality. Such petition shall be presented to the court within thirty (30) days after the filing of the decision in the office of the board.

(9) Upon the presentation of such petition the court may allow a writ of certiorari directed to the board of adjustment to review such decision of the board of adjustment and shall prescribe therein the time within which a return thereto must be made and served upon the relator's attorney, which shall not be less than ten (10) days and may be extended by the court. The allowance of the writ shall not stay proceedings upon the decision appealed from, but the court may, on application, on notice to the board and on due cause shown, grant a restraining order.

(10) The board of adjustment shall not be required to return the original papers acted upon by it, but shall be sufficient to return certified or sworn copies thereof or of such portions thereof as may be called for by such writ. The

return shall concisely set forth such other facts as may be pertinent and material to show the grounds of the decision appealed from and shall be verified.

(11) If, upon the hearing, it shall appear to the court that testimony is necessary for the proper disposition of the matter, it may take evidence or appoint a referee to take such evidence as it may direct and report the same to the court with his findings of fact and conclusions of law, which shall constitute a part of the proceedings upon which the determination of the court shall be made. The court may reverse or affirm, wholly or partly, or may modify the decision brought up for review.

(12) Costs shall not be allowed against the board unless it shall appear to the court that it acted with gross negligence, or in bad faith, or with malice in making the decision appealed from."

-End-

CONSIDERATION OF SENATE BILL NO. 40: Senator Himsl, sponsor of the bill, gave a brief rundown of the basics of the established law and what the proposed change is, pointing out that the city government didn't have to make use of the change unless they wanted to.

City Manager Al Thelen stated that the only thing he thought the Board of Adjustments should be curtailed on is land use variances. Mr. Mizner, speaking for Kalispell's absent representative, said that he knew some of the smaller cities and towns would like to have access to changes through their elected officials rather than the Board of Adjustments.

J. Einar Larson read a letter from John W. Larson* opposing the bill which stated that he would not like to see Montana base its zoning policy on politics and favoritism. In the letter it was stated that city officials can become warped. Senator Cetrone questioned Mr. Larson as to whether it was not possible for Board of Adjustment members to also become warped. Mr. Larson replied he only read what was quoted in the letter but he believed this could happen. He also stated that the power should be left with the Board of Adjustment; that it wasn't nearly as hard to get the case to the Supreme Court for appeal as it was to get it to the City Commission for an appeal.

Ed Vollmer, a retired Highway Department employee and also a member of the Helena Board of Adjustments, stated he would like to see the power remain with the board or he would just as soon resign. J.E. Larson, the Chairman of the Helena Board of Adjustment, made a few more comments; then the floor was turned over to Kermit Mueller representing the Helena Property Owners Association. He had just distributed a letter to the committee members and begun his testimony** when Chairman Romney interrupted to say that the committee would have to adjourn as the Senate was going into session.

ADJOURN: Meeting adjourned by a motion from Senator McCallum and seconded by Senator Story. To be continued Tuesday, January 21, 1975, 11:00 A.M. Time: 11:59 A.M.

Miles Romney

MILES ROMNEY, Chairman

dg

*Exhibit A - attached
**Exhibit B - attached

ROLL CALL

LOCAL GOVERNMENT COMMITTEE

44th LEGISLATIVE SESSION 1975

Date 1-18-75

NAME	PRESENT	ABSENT	EXCUSED
MILES ROMNEY, CHAIRMAN	✓		
V. E. CETRONE, V. CHMN.	✓		
TERRY MURPHY	✓		
CORNIE R. THIESSEN	✓		
ROBERT D. WATT		✓	✓
PAT M. GOODOVER	✓		
GEORGE McCALLUM	✓		
PETER STORY	✓		

Exhibit A

To the distinguished members of the Committee on Local Government,
Montana State Senate:

My Dear Senators,

Permit me this opportunity to offer testimony in opposition to Senate Bill 40 which you presently have under consideration.

While I presently attend law school outside the state, I do plan to return to my home soon. As such, I have a keen interest in the rights and privileges of Montana citizens and am greatly concerned by the threat posed by S. B. 40.

If this measure becomes law, substantially amending Sec. 11-2707, R.C.M. 1947, special exceptions to zoning ordinances would be attainable only through the 'legislative branch' of city government, the city commission.

As currently established under Sec. 11-2707, R.C.M. 1947, this Board of Adjustment can grant special, limited exceptions to zoning ordinances where: "from the terms of the ordinance as will not be contrary to the public interest, where owing to special conditions a literal enforcement of the provisions of the ordinance will result in unnecessary hardship."

To the ordinary citizen, the Board of Adjustment offers a two-fold advantage. First, the Board is an inexpensive and expeditious alternative to the slow and costly court system. Secondly, and perhaps more significant to those interested in the rights of the individual, this administrative or quasi-judicial body is governed by a strict statutory standard subject to close court scrutiny.

When the ordinary man does not feel that he has been treated justly by the Board, he can appeal to the judiciary for review of this

administrative decision. The courts of Montana like courts of other states feel quite comfortable in reviewing administrative action limited by specific statutory guidelines. The appellant too is aided because he or she need only prove that the Board's action is not reasonable in view of Sec. 11-2707, R.C.M. 1947.

Looking to the results under S. B. 40, the advantages to the ordinary citizen caught up in the red tape of regulations affecting the use of his land are non-existent. True, he is given a hearing before the legislative body, but the conduct of this hearing is uncertain and often set in the emotion-charged atmosphere that is close to that encountered in 18th Century France during the Reign of Terror.

His chances of successful appeal of the legislative determination to the courts are even more uncertain. While courts show no hestance to review administrative action, there is great reluctance to review the reasonableness of legislative action. Judges often feel that they are intruding on the separation of powers doctrine. In addition, the record of proceedings before the legislative body is usually quite inadequate for review by the courts. And finally, the standard of review to which the court subjects legislative acts is more difficult for the challenger to overcome. The body must have acted arbitrarily, capricuously, or abused its discretion generally. Given the broad powers deligated to the local legislature, this standard becomes a stonewall to judicial review.

It is argued that S. B. 40 will only affect 'Land Use Variances". Clearly the use of one's property is one of his most treasured rights. To deprive one of those rights without the security of an

adequate forum or a realistic hope of judicial review as S.B. 40 will do, is surely not a small or insignificant matter.

I am advised that the Helena Board of Adjustment will consider the adoption of these procedural guidelines to further safeguard the rights of those before it:

1. The Board of Adjustment shall publish the rules to govern the hearing so that every interested party shall know in advance the procedures under which a hearing shall be conducted.

2. Technical rules of evidence are not applicable to the hearing but the local agency shall exclude irrelevant, immaterial, or unduly repetitious evidence and such evidence as is not of the kind which would affect reasonable men in the conduct of their daily affairs.

3. All witnesses intending to speak in favor of or opposed to a proposed amendment, variance, or exception shall be sworn under oath by the chairman and the right of cross-examination shall be available to every party. No petitions signed by persons not present at the hearing shall be admitted into evidence except by stipulation of all parties to the hearing.

4. No finding by the Board of Adjustment shall be made except as it is based upon evidence introduced at said hearing or upon official records of the municipality or other public agency that are available to the public.

5. A transcript of the testimony at the hearing shall be made, copies of which shall be available at cost to any party who requests the same. All exhibits accepted in evidence shall be identified and duly preserved, or, if not accepted in evidence shall be properly identified and the reason for the exclusion clearly noted in the record.

6. When there is a municipal planning staff the municipal authority shall require that any report by the staff on the application be placed on public record prior to the hearing.

7. The Board of Adjustment shall support its conclusions by findings of fact and shall recite with particularity the reasons for its conclusions in the specific case before it.

The above procedures would do much to increase the ability of the courts to review variances and to make their granting more equitable and uniform. It would be a progressive move for the 44th Legislature to apply these rules of procedure to all local administrative agencies.

Senate Bill 40 by content seeks to destroy any chance for development of a uniform and fair method of granting variances by transferring these duties from the judicially reviewable Board of Adjustment to the legislative branch of local government, which is for practical purposes not subject to judicial review.

The problem is ably described by Law Professor Robert Ellickson writing in the University of Chicago Law Review: "Zoning is not a perfectly balanced roulette wheel randomingly bestowing its wins and losses. In most communities, the wheel is warped; friends of the house come out while others are loosers."

Is Montana going to base its zoning policy on the political influences and favoritism present in the local city legislature or will it seek to strengthen the quasi-judicial mechanism of city government toward equity and uniformity?

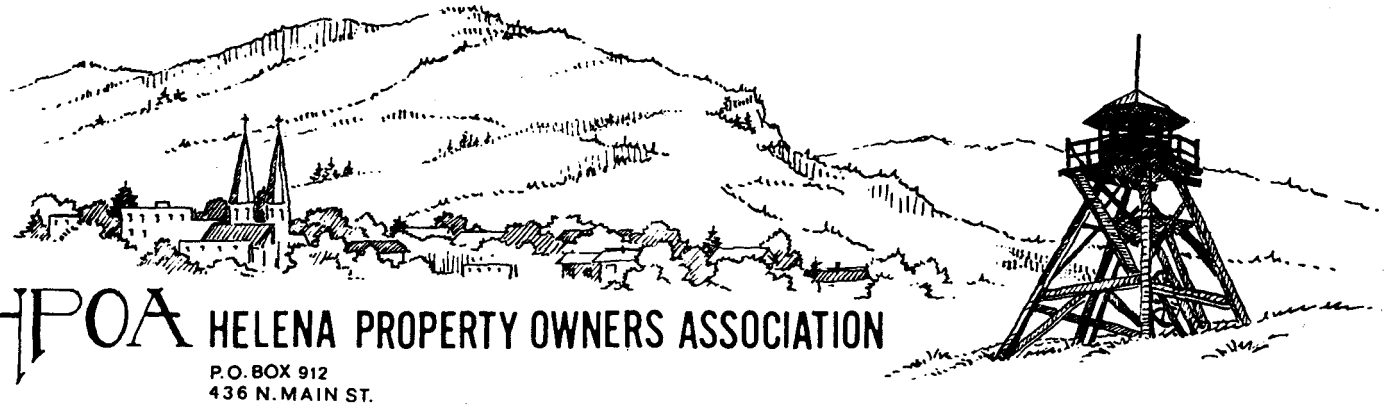
I close my testimony with a quote by Justice Ray Klingbill of the Illinois Supreme Court who had these words to say about a case where the local legislative body made all the landuse decisions.

> 'It is not part of the legislative function to grant permits, make special esceptions or decide particular cases. Such activities are not legislative but administrative, quasi-judicial, or judicial in character. To place them in the hands of legislative bodies, whose acts as such are not judicially reviewable, is to open the door completely to arbitrary government.'

Respectfully,

John W. Larson
University of Puget Sound
School of Law
Tacoma, Wa. 98444

Exhibit 2



HPOA HELENA PROPERTY OWNERS ASSOCIATION
P.O. BOX 912
436 N. MAIN ST.
HELENA, MONTANA 59601
PH. 406-443-4480

January 18, 1975

Members of the Senate:

Our association opposes (Senate Bill No. 40) to regulate the powers of the city and towns local board of adjustment.

We feel the small property owner has a right to their judgement. This should include individual land use as the case may be.

These boards are familiar with the problems since they work with them continually, and they normally make very good decisions.

The problems are tremendous and need every avenue we have to solve them.

We ask you to leave the law the way it is and to encourage citys to use these boards as a faithful right arm.

Very truly yours,

Kermit Mueller

Kermit Mueller President.

PHONE 406/442-3360

Diehl Development Corporation

~~P.O. BOX 241~~ 1420 Prospect Ave.
HELENA, MONTANA 59601

The Honorable Senator
Cornie Thressen
Capital Building
Helena, Montana 59601

January 16, 1975

Dear Senator:

In regard to the matter of Senate Bill 40 which amends Section 11-2707, "Reserving Certain Decisions to the City or Town".

It is difficult to ascertain how such a change will improve the zoning-land control process in Montana. The argument asserting that you can't have the Variance Board overruling the City Commission simply doesn't wax because a decision resulting in the "taking of private property" is no better coming from the City Commission than from the Variance Board.

Decisions out of the Variance Board on land use are apt to be more equitable because the Variance Board is more insulated from the majority and that is important in this day and age. (Recall 60,000,000 Americans can be wrong.)

Therefore, I strongly urge that this Senate Bill 40 be killed.

Sincerely,

W. D. Diehl

WDD/lr

MINUTES OF THE MEETING
LOCAL GOVERNMENT COMMITTEE
MONTANA STATE SENATE

January 21, 1975

The fourth meeting of the Local Government Committee was called to order by Chairman Romney on the above date in Room 410 of the State Capitol Building at 11:03 A.M.

ROLL CALL: All members were present with the exception of Senator Watt who was excused.

The following witnesses were present to testify at the meeting:

Kermit Mueller, Helena Property Owners Association
Ralph Anderson, property owner
Don Kerns, Community Devel. Director, City of Helena
J. Einar Larson, property owner
Dan Mizner, Montana League of Cities and Towns
Senator Blaylock, sponsor of SB 47
Ray Stoner, Montana Association of Counties
John Bell, Clerks and Recorders
Everett Snortland, Montana Farm Bureau
Dean Zinnecker, Montana Association of Counties

CONSIDERATION OF SENATE BILL 40: Mr. Mueller, representing the Helena Property Owners Association, briefly reviewed his previous testimony given in opposition to the bill. Mr. Ralph Anderson took the floor and cited a personal instance where the Helena Board of Adjustments came to his rescue in granting a variance for a piece of property he wanted to develop which could be used for no other purpose saying in conclusion that he was definitely against this bill. Discussion and questions followed. Senator Cetrone questioned the witnesses as a whole as to whether the City of Helena has a board to which someone could go for a variance which in turn would make a recommendation to the City Commission. Mr. Mueller and Mr. Larson replied they thought it was the Planning Board. More discussion followed on this question with Mr. Don Kerns stating that the Zoning Board makes recommendations to the City Commission and that there is also a Board of Appeals for this - that the Board of Adjustments is in fact in error when making zoning changes for variance requests.

Senator Story brought up the fact that as he understands the law, it reads the City shall appoint a Board of Adjustments - not may. Requested this bill be tabled until he had time to look into the matter. Will bring results to the next meeting. Senator Goodover will also have something to contribute to the next discussion after he checks with the officials in Great Falls.

ROLL CALL

LOCAL GOVERNMENT COMMITTEE

44th LEGISLATIVE SESSION 1975

Date 1-21-75

NAME	PRESENT	ABSENT	EXCUSED
MILES ROMNEY, CHAIRMAN	✓		
V. E. CETRONE, V. CHMN.	✓		
TERRY MURPHY	✓		
CORNIE R. THIESSEN	✓		
ROBERT D. WATT		✓	
PAT M. GOODOVER	✓		
GEORGE McCALLUM	✓		
PETER STORY	✓		

MINUTES OF THE MEETING
LOCAL GOVERNMENT COMMITTEE
MONTANA STATE SENATE

January 28, 1975

The seventh meeting of the Local Government Committee was called to order by Chairman Romney on the above date in Room 410 of the State Capitol Building at 11:03 A.M.

ROLL CALL: All members were present.

The following witnesses were present to testify at the meeting:

Dan Mizner, Montana League of Cities and Towns
Bill Chiesa, President, Rocky Mtn. Assoc. of Fairs
Senator Devine, Sponsor of SB 85
Kathy Wohlberg, Last Chance Stampede and Fair
Senator Greely, Sponsor of SB 116
Clarence Lindseth, Treasurer's Office, Cascade Co.
Helen Eckert, City of Billings
Ray Stoner, Montana Association of Counties
May Jenkins, Treasurer of Yellowstone County
Dean Zinnecker, Montana Association of Counties
Polly Prchal, City of Billings

RECONSIDERATION OF SENATE BILL 40: Senator Story cited some court cases which verify the fact that cities must provide a separate appeal board to protect citizens from the absolute power held by the zoning board. (exhibit A) Following up his testimony, he made a motion that the bill DO NOT PASS. Motion did not carry; and testimony continued, during which it came to light that the Board of Adjustments could not be dissolved except when term of office expired, councilmen changed and the Board was made up of new members, or if there was a definite case of malpractice in which case the city must show cause why the Board should be disbanded.

CONSIDERATION OF SENATE BILL 85: Senator Devine, sponsor of this bill, presented a synopsis of the basics involved, and introduced Bill Chiesa to further expound. Mr. Chiesa stated that the reason for the bill is that currently fair boards must get approval of any expenditure over $40,000 from the voters which requires considerable time, in which case the building season has lapsed. They would like this limitation lifted to enable them to proceed with projects without calling for public approval. The time lapse could also mean higher building costs as construction costs could soar or the building in need of repair could be further dilapidated. There were no opponents present. (exhibit B)

CONSIDERATION OF SENATE BILL 116: Senator Greely, sponsor of the bill, stated the purpose of the bill was to eliminate loss of revenue to cities and counties through fluctuating ratable interest. Clarence Lindseth reemphasized this and quoted some figures to substantiate his claims for Cascade County. Helen Eckert distributed some bookkeeping figures citing the loss for the City of Billings during a specific period of time. (exhibit C) Mr. Stoner stated that for counties having no bank within its boundary it was almost impossible to keep funds within same. May Jenkins also distributed bookkeeping figures (exhibit D) to support her claims of loss. The witnesses also pointed out the fact that although it is actually illegal under county law, they have been soliciting bids for the best interest rate for their monies and would appreciate the bill being passed so they could do the same legally. Senator Cetrone questioned the complete absence of bankers at this hearing but was assured by Committee members as well as witnesses that the bankers were in favor of the bill.

DISPOSITION OF BILLS: Senator Thiessen made a substitute motion that SB 40 DO PASS. Seconded by Senator Cetrone. Motion carried.

SB 85: Senator McCallum made a motion that SB 85 DO PASS. Seconded by Senator Goodover. Motion carried.

SB 116: Senator Watt made a motion that SB 116 DO PASS. Seconded by Senator Cetrone. Motion carried.

ADJOURN: There being no further business, the meeting adjourned at 12:12 A.M.

Miles Romney

MILES ROMNEY, Chairman

MR:dg

ROLL CALL

LOCAL GOVERNMENT COMMITTEE

44th LEGISLATIVE SESSION 1975

Date 1-28-75

NAME	PRESENT	ABSENT	EXCUSED
MILES ROMNEY, CHAIRMAN	✓		
V. E. CETRONE, V. CHMN.	✓		
TERRY MURPHY	✓		
CORNIE R. THIESSEN	✓		
ROBERT D. WATT	✓		
PAT M. GOODOVER	✓		
GEORGE McCALLUM	✓		
PETER STORY	✓		

Each day attach to minutes

of 600 feet from the land seeking the exception. If this provision of the ordinance were mandatory and binding upon the board it probably might be open, in a proper case, to a charge of unconstitutionality. See State of Washington ex rel. Seattle Title Trust Co., v. Roberge, 278 U.S. 116, 49 S.Ct. 50, 73 L.Ed. 210, 86 A.L.R. 654. But, in the instant case, it is not of that character.

The board of review of the town of Narragansett is charged, by both the statute and the ordinance, with the duty of determining facts from reasonably competent testimony and other proper means, such determination forming the basis for official action within the limits of reasonable discretion. In other words, the board is required to act judicially on facts lawfully ascertained. This court in Sundlun v. Zoning Board of Review, 50 R.I. 108, at page 117, 145 A. 451, 455, says: "Public notice of the hearing of an application for exception to the provisions of a zoning ordinance is not given for the purpose of polling the neighborhood on the question involved, but to give interested persons an opportunity to present facts from which the board may determine whether the particular provision of the ordinance, as applied to the applicant's property, is reasonably necessary for the protection of public safety, public health, public morals, or the general welfare in the proper sense. The board should base their determination upon facts which they find to have been established, instead of upon the wishes of persons who appear for or against the granting of the application." See, also, Bilt-Wel Co. v. Dowling, 135 A. 798, 5 N.J.Misc. 180.

[5] A person who honestly believes that he would be unnecessarily or unreasonably restricted in the use of his land by the strict enforcement of the provisions of a zoning ordinance is entitled to come before a zoning board of review as a matter of right and not by way of permission or tolerance on the part of the board. Such a board should act upon the facts established at a hearing, and if, in addition thereto, the board desires to take into consideration other facts personally known to any of its members, such additional facts should be made known, so that they may become a part of the record. Furthermore, the decision of the board upon all the facts thus presented should bear a substantial relation to the common interests and general welfare.

[6] The decision of a zoning board of review will not ordinarily be disturbed by this court, if, upon consideration of all the facts and surrounding circumstances, the decision is not clearly an abuse of discretion, for we will assume that such a public body will act fairly and with reason and not arbitrarily. Norcross v. Board of Appeal, 255 Mass. 177, 150 N.E. 887; People ex rel. Facey v. Leo, 230 N.Y. 602, 130 N.E. 910. But this presumption in favor of the board's decision is not a shield against all inquiry as to its reasonableness or fairness. If, upon review, the decision of the board granting or refusing an exception to the zoning ordinance is clearly unreasonable or arbitrary, such decision will be set aside.

[7,8] The statute in this case expressly authorizes a party aggrieved to prosecute a writ of certiorari in this court. By so doing, the Legislature places upon us the duty of passing upon the reasonableness of the discretion exercised by the board of review in any given case falling within the scope of the statute. We will be put to great unnecessary inconvenience in the performance of this duty in order to prevent injustice if any board, acting as the respondent did in the instant case, fails to keep a proper record of all the proceedings, including a fair report or reasonably accurate summary of the oral testimony or facts brought before them or otherwise known to them, upon which they are to base their decision. It is therefore proper procedure for zoning boards of review to keep at least a fair record of the proceedings, substantially in the manner specified. Such boards should also set forth the ground or grounds for their decision, as this court is entitled to know the basis for their action, so that it may determine whether their decision on the facts in evidence bears a substantial relation to the protection of the public interests.

[9] We find nothing in the record before us that warrants a denial of the petitioners' request to use parcels No. 1 and 2 for "a commercial bathing beach and commercial bath or boat houses or stores for retail trade or commercial recreation uses." The evidence indicates that the granting of the petitioners' request would be objectionable to a few property owners in that general neighborhood, at least two of whom are themselves engaged in business in that locality. But this is quite im-

the spirit of the ordinance shall be observed, public safety secured and substantial justice done."

It is apparent that the wording of the ordinance does not conform in all particulars with the wording of the above-quoted provision of the statute. The board of appeals has, of course, all the powers granted by the statute, and if it could be urged that its powers were limited to those granted by the statute, and that therefore the broader language of the zoning ordinance in question granted powers beyond those authorized by statute, still this provision was a part of the zoning ordinance as originally adopted, and is impressed upon the provisions of the ordinance classifying the restricted areas, and is as much a part of them as if it had been read into each one of them; and I can see no reason why it was not clearly within the power of the municipality to grant this power to the board of appeals, as a limitation upon the apparent restrictions themselves. I therefore think that the decisions construing an identical provision in the Building Zone Resolution of the city of New York are in point. It is therefore unnecessary here to pass definitely upon the question whether this provision of the statute grants to the board of appeals the power to vary the restrictions upon a district. I am of the opinion, however, that the provision should be liberally construed, and that it would be of little practical value unless the Legislature intended to grant to a board of appeals the power to do what in the instant case was done.

It is apparent that zoning regulations, whereby the freedom of action of an owner in dealing with his own property is limited, outside of the field of nuisance, in their very nature raise grave constitutional questions as to whether inherent rights are not in a particular case violated. There is, of course, no constitutional basis for sustaining a zoning ordinance, as such, unless it may be shown to have been enacted in the interests of public health, public safety, or general welfare; and of course, when constitutional rights are threatened, rules which tend to destroy these rights must be carefully considered and strictly construed. It was a recognition of this situation which led to the incorporation in zoning ordinances of provisions for boards of appeals, to the end that, prior to the time when the questions of constitutional rights were brought in question before the courts, there should be given to the subject consideration by a body presumably expert in passing upon the questions of fact involved.

In the case of People ex rel. Sheldon v. Board of Appeals of City of New York, 234 N. Y. 484, at page 493, 138 N. E. 416, 419, the Court of Appeals used this language:

"A review of the several laws enacted clearly indicates that the Legislature appreciated the far-reaching effect of any law bearing upon the subject of a division of the city into zone districts as affecting the constitutional rights of citizens in the use of their property, and so far as possible, with a view of protecting such rights, co[illegible]ded that the delegation of power to be conferred by it upon the board [illegible]stimate and apportionment,

to adopt regulations for the use to which property might be adapted, should be limited to the adoption of regulations designed to promote public health, safety, and general welfare, the conservation of property values, the suitability of each district for particular uses, and the enhancement of the value of the land throughout the city."

This was in reference to the creation of a board of appeals in the city of New York by the board of estimate and apportionment of said city.

I have already expressed the view that the subdivision of the zoning act under consideration is a proper and controlling provision. It is true that the effect of its operation, in specific cases, may be to vary the restrictions provided for a particular area, with the effect of making, so far as the specific case is concerned, what might amount to a reclassification; but there can be no objection to this, for that is the very intent and purpose of the provision, "where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of the provisions of the ordinance." The creation of a board of appeals, with discretionary powers to meet specific cases of hardship or specific instances of improper classification, is not to destroy zoning as a policy, but to save it. The property of citizens cannot and ought not to be placed within a strait-jacket. Not only may there be grievous injury caused by the immediate act of zoning, but time itself works changes which require adjustment. What might be reasonable to-day might not be reasonable to-morrow.

"If in any zoning ordinance there is not created a board of appeals, with the broad powers provided in the statute and in this zoning ordinance, and under which serious injuries to private rights occasioned by reason of peculiar conditions or improper zoning can be avoided, the courts, bound by the duty to protect individuals from invasion of their constitutional rights, would develop a line of decisions which, by reason of their number and character, might eventually destroy the policy of zoning itself. Through the wise action of a proper board of appeals, exercising broad powers and possessed of expert knowledge as to the general plan and purpose of the zoning ordinance of a city, the inequalities and injustices resulting from a strict enforcement of a general zoning ordinance will in most instances be avoided; the board in this respect acts with something of the ancient powers of a court of equity in a field where the law by reason of its generality works an injustice.

This power on the part of a board of appeals would not justify it in acting arbitrarily or as a matter of favor in setting aside or modifying the effect of a zoning ordinance, as to a particular piece of property; but the intent of the statute is clear that it must exercise sound judgment, and only "where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter" of the ordinance. And then again the board is limited in its power to a specific case, and to an action in harmony with the general purpose and intent of the zoning

tially of a broad and unrestricted nature. St. Basil's Church of City of Utica v. Kerner, supra; Bradley v. Board of Zoning Adjustment, supra; People v. Board of Appeals, 234 N. Y. 484, 138 N. E. 416; Village of Euclid, Ohio, v. Ambler Realty Co., supra; King Mfg. Co. v. City Council of Augusta, supra. It is equally well settled that the conferring of such powers upon a board does not amount to an unlawful delegation of legislative authority. Bradley v. Board of Zoning Adjustment, supra; McCord v. Ed Bond & C. Co., 175 Ga. 697, 165 S. E. 590, 86 A. L. R. 703; R. B. Construction Co. v. Jackson, 152 Md. 671, 137 A. 278; In re Dawson, 136 Okl. 113, 277 P. 226.

In Bradley v. Board of Zoning Adjustment, supra, it was said: "In earlier days, the argument that the powers conferred upon the board amounted to an unlawful delegation of legislative authority would have demanded serious consideration. In the light of a group of comparatively recent decisions, where that subject has been discussed fully, there can no longer be serious doubt that in this particular the statute does not offend any provision of the Constitution. This is true even though the board is given power to change on the terms stated in the statute the boundaries of the several districts or zones established by the Legislature itself."

There is force in the argument advanced by respondents that the creation and existence of such a board is essential to the constitutionality of the law and the ordinance. The language of the New York court is pertinent on this point. In the case of St. Basil's Church of City of Utica v. Kerner (N. Y.), supra, the subject was discussed in the following language: "The creation of a board of appeals, with discretionary powers to meet specific cases of hardship or specific instances of improper classification, is not to destroy zoning as a policy, but to save it. The property of citizens cannot and ought not to be placed within a strait-jacket. Not only may there be grievous injury caused by the immediate act of zoning, but time itself works changes which require adjustment. What might be reasonable to day might not be reasonable to-morrow. If in any zoning ordinance there is not created a board of appeals, with the broad powers provided in the statute and in this zoning ordinance, and under which serious injuries to private rights occasioned by reason of peculiar conditions or improper zoning can be avoided, the courts, bound by the duty to protect individuals from invasion of their constitutional rights, would develop a line of decisions which, by reason of their number and character, might eventually destroy the policy of zoning itself." See, also, Neelow v. Cambridge, supra; King Mfg. Co. v. City Council of Augusta, supra; People v. Board of Appeals, supra.

[7, 8] Zoning ordinances must have a real and substantial bearing upon the public health, safety, morals, and general welfare of a community. They must find their justification in some aspect of the police power asserted for the public welfare. Dowsey v. Village of Kensington, 257 N. Y. 221, 177 N. E. 427, 86 A. L. R. 612; State of Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U. S. 116, 49 S. Ct. 50, 73 L. Ed. 210, 86 A. L. R. 651. Ordinances not so designed are at variance with the fundamental nature of private ownership and in violation of constitutional prohibitions. Coppage v. Kansas, 236 U. S. 1, 35 S. Ct. 240, 59 L. Ed. 441, L. R. A. 1915C, 960; Truax v. Corrigan, 257 U. S. 312, 42 S. Ct. 124, 66 L. Ed. 254, 27 A. L. R. 375; Women's, etc., Society v. Kansas City, Mo. (C. C. A. Mo.) 58 F.(2d) 593.

[9-11] Under the guise of protecting the public or advancing its interest, the state may not unduly interfere with private business or prohibit lawful occupations, or impose unreasonable or unnecessary restrictions upon them. Any law or regulation which imposes unjust limitations upon the full use and enjoyment of property, or destroys property value or use, deprives the owner of property rights. State v. Gateway Mortuaries, Inc., 87 Mont. 225, 287 P. 156, 68 A. L. R. 1512; Petty v. City of Sidney, 79 Mont. 314, 257 P. 1007, 56 A. L. R. 872. A business is a property right, and as such is entitled to the protection of both the state and Federal Constitutions. State v. Gateway Mortuaries, Inc., supra; Liggett Co. v. Baldridge, 278 U. S. 105, 49 S. Ct. 57, 73 L. Ed. 204.

[12] It is therefore apparent that the provision for a board of adjustment (or similar fact-finding body), vested with broad general powers, is important to the validity of the zoning ordinance and the statute under which it was enacted. In the absence of such a board vested with power to prevent the inequalities and injustices which might otherwise result from a strict enforcement of the zoning ordinance, there would be grave doubts as to the constitutionality of the ordinance and the statute under which it was enacted. St. Basil's Church of City of Utica v. Kerner, supra. In that event this ordinance would probably come within the mean-

SENATE COMMITTEE LOCAL GOVERNMENT

Date January 28 1975 Senate Bill No. 40 Time 11:16

NAME	YES	NO
V. E. CETRONE, VICE CHAIRMAN	✓	
TERRY MURPHY	✓	
CORNIE R. THIESSEN	✓	
ROBERT D. WATT		✓
PAT M. GOODOVER	✓	
GEORGE McCALLUM	✓	✓
PETER STORY	✓	
MILES ROMNEY, CHAIRMAN		

Deanna L Heiss
Secretary

Miles Romney
Chairman

Motion: Do pass

(include enough information on motion--put with yellow copy of committee report.)

FEBRUARY 10, 1975
PROCEEDINGS OF THE
LOCAL GOVERNMENT COMMITTEE

The meeting was called to order at 8:00 A.M. by Chairman Gerke. The secretary called roll; Reps. Robbins and South were excused. All other members were present.

SENATE BILL 30: Senator Drake, chief sponsor, explained briefly this bill is requiring the attorney general to give written opinions to the city attorney of any city or town upon any question relating to that office of the governing body. There is another bill by Rep. Brand that is similar, and Senator Drake didn't care which bill was passed but recommended the bill where the request could come from city or county attorney. Proponents were Dan Mizner, Executive Director, League of Cities and Towns, and Harley Warner, city of Helena. There were no opponents. It was suggested that HB 110 be amended in the Senate to include the county attorney.

SENATE BILL 40: Senator Himsl, chief sponsor, explained this bill deals with the city's powers related to the board of adjustments. It provides that cities and towns may appoint a board of adjustments, and it provides that if the council wishes they may restrict the powers of the board. Proponents were Harley Warner, city of Helena, and Dan Mizner, Executive Director, League of Cities and Towns. There were no opponents.

HOUSE BILL 596: Rep. Lynch, chief sponsor, explained this is a bill that asks for two hundred fifty dollars ($250) as a uniform allowance per year for the deputy sheriffs. There were no other proponents. Dean Zinnecker, Executive Director of the Montana Association of Counties, was opposed to this bill and said that this should be a negotiated item not legislative.

HOUSE BILL 595: Sponsor had not arrived.

HOUSE BILL 536: Chief sponsor, Rep. South, and
HOUSE BILL 547: Chief sponsor, Rep. Gerke
Chairman Gerke advised the committee that both bills are on the same subject to spell out the proposed method of financing of local study commissions. Rep. Gerke called on Dale Harris, Director, State Commission on Local Government, to explain the bills. Mr. Harris said these two bills do not appropriate the money to be used by the local study commissions, but provides the formulas for distribution of money if the money is appropriated. HB 547 does permit a county under 2,000 population to apply for additional state funds up to a total of six thousand dollars ($6,000) if the county should feel they need the additional funds. HB 536 gives the smaller cities and counties a much smaller basic grant. A copy of a memorandum on the proposals was given to each member of the committee - exhibit 1. Proponents, Betty Boettger and Penny Egan, Lewis and Clark County Local Government Study Commission, spoke and preferred HB 547. Proponents, Dan Mizner, Executive Director, League of Cities and Towns, thought the local study commissions should be adequately financed; and Dean Zinnecker, Executive Director, Montana Association of Counties, felt the small counties should be adequately financed.

Proponent, H. W. Gilman, Madison County Local Government Study Commission, spoke in support of HB 536 as it gives the smaller town and counties more leeway in determining the amount of money they will need to conduct and complete their study of their local government structure. There were no opponents

HOUSE BILL 595: This will be held over and the sponsor contacted.

The committee went into executive session.

SENATE BILL 30: It was moved by Rep. Kendall, seconded by Rep. Gwynn, that SB 30 DO PASS. Motion carried. Rep. Asher voted no. Reps. Robbins and South were excused.

SENATE BILL 40: It was moved by Rep. O'Connell, seconded by Rep. Sloan, that SB 40 DO PASS. After a short discussion, question was called. Motion carried. Rep. Kendall voted no. Reps. Robbins and South were excused.

HOUSE BILL 596: It was moved by Rep. Gwynn, seconded by Rep. Asher, that HB 596 DO NOT PASS. Question was called. Motion carried unanimously. Reps. Robbins and South were excused.

HOUSE BILL 536: It was moved by Rep. Gwynn, seconded by Rep. Kummerfeldt, that HB 536 DO PASS. After discussion by the committee, question was called. Motion carried. Those voting no were Reps. Asher, Wyrick, Bertelsen and Marks. Reps. Robbins, South excused.

HOUSE BILL 547: It was moved by Rep. Kendall, seconded by Rep. Magone, that HB 547 DO NOT PASS. Motion carried. Rep. Bertelsen voted no. Reps. Robbins and South were excused.

HOUSE BILL 268: Rep. Palmer reported on the decision of the subcommittee. It was recommended that the amendments be adopted - exhibit 2. The people concerned with this bill were agreeable to the amendments. It was moved by Rep. Palmer, seconded by Rep. O'Connell, that the committee adopt the amendments to HB 268. After discussion, question was called. Motion carried. Reps. Marks, Bertelsen, Wyrick voted no. It was moved by Rep. Palmer, seconded by Rep. Kendall, that HB 268 DO PASS AS AMENDED. Motion carried. Those voting no were Reps. Asher, Marks, Wyrick, and Bertelsen. Reps. Robbins and South were excused.

The meeting adjourned at 9:30 A.M.

Harold E. Gerke, Chairman

Yvonne Borgmann, Secretary

SENATE BILL NO. 40

INTRODUCED BY HIMSL, DRAKE, ROMNEY, THIESSEN, FLYNN

A BILL FOR AN ACT ENTITLED: "AN ACT TO AMEND SECTION 11-2707, R.C.M. 1947, TO PROVIDE THAT AN ORDINANCE CREATING A BOARD OF ADJUSTMENT MAY RESERVE CERTAIN DECISIONS TO THE CITY OR TOWN."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 11-2707, R.C.M. 1947, is amended to read as follows:

"11-2707. Board of adjustment. Such city or town council or other legislative body may provide for the appointment of a board of adjustment, and in the regulations and restrictions adopted pursuant to the authority of this act may provide that the said board of adjustment may, in appropriate cases, and subject to appropriate conditions and safeguards, make special exceptions to the terms of the ordinance in harmony with its general purposes and intent and in accordance with the general or specific rules therein contained.

An ordinance adopted pursuant to this section providing for a board of adjustment may restrict the authority of the board and provide that the city or town council, or other legislative body, reserves to itself the power to make certain exceptions to regulations, ordinances, or land use plans adopted pursuant to this chapter.

(1) The board of adjustment shall consist of five (5) members, each to be appointed for a term of three (3) years and removable for cause by the appointing authority upon written charges and after public hearing. Vacancies shall be filled for the unexpired term of any member whose term becomes vacant.

(2) The board shall adopt rules in accordance with the provisions of any ordinance adopted pursuant to this act. Meetings of the board shall be held at the call of the chairman and at such other times as the board may determine. Such chairman, or in his absence the acting chairman, may administer oaths and compel the attendance of witnesses. All meetings of the board shall be open to the public. The board shall keep minutes of its proceedings, showing the vote of each member upon each question, or if absent or failing to vote, indicating such fact, and shall keep records of its examinations and other official actions, all of which shall be immediately filed in the office of the board and shall be a public record.

(3) Appeals to the board of adjustment may be taken by any person aggrieved or by any officer, department, board, or bureau of the municipality affected by any decision of the adminstrative officer. Such appeal shall be taken within

REFERENCE BILL

a reasonable time, as provided by the rules of the board, by filing with the officer from whom the appeal is taken and with the board of adjustment a notice of appeal specifying the grounds thereof. The officer from whom the appeal is taken shall forthwith transmit to the board all papers constituting the record upon which the action appealed was taken.

(4) An appeal stays all proceedings in furtherance of the action appealed from, unless the officer from whom the appeal is taken certifies to the board of adjustment after the notice of appeal shall have been filed with him that by reason of facts stated in the certificate a stay would, in his opinion, cause imminent peril to life or property. In such case proceedings shall not be stayed otherwise than by a restraining order which may be granted by the board of adjustment or by a court of record on application on notice to the officer from whom the appeal is taken and on due cause shown.

The board of adjustment shall fix a reasonable time for the hearing of the appeal, give public notice thereof, as well as due notice to the parties in interest, and decide the same within a reasonable time. Upon the hearing any party may appear in person or by attorney.

(5) The board of adjustment shall have the following powers:

To hear and decide appeals where it is alleged there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement of this act or of any ordinance adopted pursuant thereto.

To hear and decide special exceptions to the terms of the ordinance upon which such board is required to pass under such ordinance.

To authorize upon appeal in specific cases such variance from the terms of the ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done.

(6) In exercising the above-mentioned powers such board may, in conformity with the provisions of this act, reverse or affirm, wholly or partly, or modify the order, requirement, decision, or determination appealed from and may make such order, requirement, decision, or determination as ought to be made, and to that end shall have all the powers of the officer from whom the appeal is taken.

(7) The concurring vote of four (4) members of the board shall be necessary to reverse any order, requirement, decision, or determination of any such administrative official, or to decide in favor of the applicant on any

matter upon which it is required to pass under any such ordinance, or to effect any variation in such ordinance.

(8) Any person or persons, jointly or severally, aggrieved by any decision of the board of adjustment, or any taxpayer, or any officer, department, board, or bureau of the municipality, may present to a court of record a petition, duly verified, setting forth that such decision is illegal, in whole or in part, specifying the grounds of the illegality. Such petition shall be presented to the court within thirty (30) days after the filing of the decision in the office of the board.

(9) Upon the presentation of such petition the court may allow a writ of certiorari directed to the board of adjustment to review such decision of the board of adjustment and shall prescribe therein the time within which a return thereto must be made and served upon the relator's attorney, which shall not be less than ten (10) days and may be extended by the court. The allowance of the writ shall not stay proceedings upon the decision appealed from, but the court may, on application, on notice to the board and on due cause shown, grant a restraining order.

(10) The board of adjustment shall not be required to return the original papers acted upon by it, but shall be sufficient to return certified or sworn copies thereof or of such portions thereof as may be called for by such writ. The

return shall concisely set forth such other facts as may be pertinent and material to show the grounds of the decision appealed from and shall be verified.

(11) If, upon the hearing, it shall appear to the court that testimony is necessary for the proper disposition of the matter, it may take evidence or appoint a referee to take such evidence as it may direct and report the same to the court with his findings of fact and conclusions of law, which shall constitute a part of the proceedings upon which the determination of the court shall be made. The court may reverse or affirm, wholly or partly, or may modify the decision brought up for review.

(12) Costs shall not be allowed against the board unless it shall appear to the court that it acted with gross negligence, or in bad faith, or with malice in making the decision appealed from."

-End-